REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 107 OF 2011

ALPHARAMA LIMITED.....APPELLANT

VERSUS

FRANCIS MULWA NYAMAI.....RESPONDENT

RULING

1. This ruling relates to the appeal instituted by the Appellant vide memorandum of appeal dated 12.6.2011 and filed on 14.6.2011 against a judgement and decree delivered on 30.6.2011 in **Machakos CMCC No. 1159 of 2010** by Hon J.M. Munguti (SRM).

2. The appeal was canvassed vide submissions. However in light of my reasoning below, I deemed it unnecessary to consider them.

3. Having looked at the draft memorandum of appeal and the record of appeal, I find it necessary to examine the issue of jurisdiction which is a critical threshold to be determined namely whether this court has jurisdiction to entertain the appeal.

4. According to the memorandum of appeal and the record of appeal, it is clear that the appeal is in respect of a dispute related to a work injury claim. There have been considerable developments with regard to the law that governs such disputes and which will guide me in this ruling.

5. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **OWNERS OF MOTOR VESSEL "LILIAN S" v CALTEX OIL (K) LTD [1989] KLR 1** that:-

> **"Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction."**

6. In the case of **Law Society of Kenya v Attorney General & Another (2009) eKLR**, Section 16 of the Work Injury Benefits Act that barred actions for recovery of damages for occupational accident except as provided for by the Act was declared unconstitutional by Judge J.B Ojwang. The consequence thereof is that appeals in relation to work injuries are handled by the Employment and Labour Relations Court and it is patently clear from the interpretations of this case that this court had no jurisdiction to entertain the appeal in the first place. This was observed in the case of **Saidi Mohammed v Diamond Industries Ltd (2018) eKLR** where the court observed that the Employment and Labour Relations Court has appellate jurisdiction in disputes relating to work injury.

7. With regard to the legal effect of the finding in the case of **Law Society of Kenya v Attorney General & Another (2009) eKLR,** I am guided by the case of ***A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88***, (at paragraph 36) where Murray CJ, stated as follows:

> **"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position"**.

8. Similarly in the South African case of ***Sias Moise v. Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Kriegler (****for the majority****) held:***

> **"If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution."**

> **"Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date."**

9. Further, In India, Mahajan J, in ***Keshavan Madhava Menon v. The State of Bombay [1951] INSC*** held that:

> **"If a statute is void from its very birth then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law."**

10. In light of the foregoing authorities, it is my considered view that it is not the function of this court to entertain any appeal in disputes relating to work injury.

11. In the result the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

Dated, delivered and signed at Machakos this 20th day of June 2019.

D.K. KEMEI

JUDGE